



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Joseph E. Sandler
Sandler, Reiff & Young, PC
300 M Street, SE Suite 1102
Washington, DC 20003

SEP 7 2010

Amanda S. La Forge
Democratic National Committee
430 South Capitol Street, SE
Washington, DC 20003

RE: MURs 6139 and 6142
Obama Victory Fund
and Andrew Tobias, in his official
capacity as Treasurer

Dear Mr. Sandler and Ms. La Forge:

On December 9 and December 11, 2008, the Federal Election Commission notified your client of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On August 24, 2010, the Commission found, on the basis of the information in the complaint, and information provided by your client, that there is no reason to believe Obama Victory Fund, and Andrew Tobias in his official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f), 441e and 434(b). Also on this date, the Commission dismissed allegations that Obama Victory Fund, and Andrew Tobias, in his official capacity as Treasurer, violated 2 U.S.C. § 441f. The Factual and Legal Analysis, explaining the Commission's findings, is enclosed.

The Commission reminds you that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify you when the entire file has been closed.

13044323933

Joseph E. Sandler
Amanda S. La Forge
MURs 6139 and 6142
Page 2

If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

13044323934

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4
5 **RESPONDENTS:** Obama Victory Fund and
6 Andrew Tobias, as Treasurer

MURs: 6139 & 6142

7
8
9 **I. INTRODUCTION**

10 These matters involve overlapping allegations that the Obama Victory Fund and Andrew
11 Tobias, in his official capacity as Treasurer ("OVF" or the "Victory Fund"), a joint fundraising
12 committee formed by Obama for America and Martin Nesbitt, in his official capacity as
13 Treasurer ("OFA") and the Democratic National Committee, accepted various excessive and/or
14 prohibited contributions in violation of the Federal Election Campaign Act of 1971, as amended,
15 ("FECA" or "the Act").

16 The complaints vary in their approach to presenting similar allegations. While some of
17 the complaints rely primarily on media reports regarding anecdotal examples of allegedly
18 suspicious online fundraising transactions, see MURs 6078/6090/6108, other complaints provide
19 a listing of transactions that are alleged to be part of suspicious patterns in OVF's fundraising
20 receipts. See MURs 6139, 6142, 6214. Rather than attempting to address all of the transactions
21 being questioned, OVF focuses on its comprehensive compliance system, and asserts that this
22 system allowed it to identify and take appropriate corrective action as to all contributions for
23 which there were genuine questions as to possible illegality. See OVF Responses in MURs 6139
24 & 6142. Respondents assert that all genuinely excessive and prohibited contributions detailed in
25 the complaints have been refunded. Respondents also contend that Complainants' allegations
26 are highly speculative, lack the specificity needed to demonstrate a violation of the Act, and that
27 the patterns identified by Complainants do not support any inference of illegality. *Id.*

13044323935

1 There are no indications that the Victory Fund accepted excessive contributions or
2 contributions from foreign nationals, or misreported disbursements to OFA. Accordingly, the
3 Commission found no reason to believe that Obama Victory Fund and Andrew Tobias, in his
4 official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f), 441e or 434(b). Although the
5 Obama Victory Fund and Andrew Tobias, in his official capacity as Treasurer, may have
6 accepted contributions from an unknown donor, the Commission dismissed this potential
7 violation of 2 U.S.C. § 441f because the amount at issue did not warrant further Commission
8 resources.

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 The primary issue in these matters is whether Respondents accepted impermissible
11 contributions through their online fundraising efforts. Although the Commission has not
12 mandated specific procedures to verify the identity of an individual making a credit card
13 contribution over the Internet, it has opined that a committee which intends to solicit and receive
14 credit card contributions over the Internet must be able to verify the identity of those who
15 contribute via credit card with the same degree of confidence that is generally provided when a
16 committee accepts a check via direct mail.¹ Advisory Opinion 2007-30 (Chris Dodd for
17 President, Inc.); see also Explanation and Justification for Matching Credit Card and Debit Card
18 Contributions, 64 Fed. Reg. 32394, 32395 (June 17, 1999); Advisory Opinion 1999-09 (Bill

¹ Advisory Opinions have looked favorably upon several methods for notifying contributors of a committee's legal obligations as well as verifying contributors' identities, including: using web page solicitation forms that post clear and conspicuous language informing prospective donors of the Act's source restrictions and contribution limits, requiring a donor to complete and submit for processing a contribution form that includes the contributor's name, contributor's name as it appears on a credit card, billing address associated with the card number, expiration date of the card, contributor's residential address and amount of contribution. See, e.g., AO 2007-30 at 3. The committee should also include procedures that will allow it to screen for contributions made using corporate or business entity credit cards, and a promise whereby the donor must attest (1) the contribution is made from his own funds and not those of another; (2) contributions are not made from general treasury funds of a corporation, labor organization or national bank; (3) donor is not a federal government contractor or a foreign national, but is a citizen or permanent resident of the United States; and (4) the contribution is made on a personal credit card for which the donor, not a corporation or business entity, is legally obligated to pay. *Id.* at 2-4.

1 Bradley for President, Inc.); Advisory Opinion 1995-09 (NewtWatch PAC); *see also*
2 Commission Guideline for Presentation in Good Order (guidance to presidential campaigns
3 seeking federal matching funds, presented by the Audit Division and approved by the
4 Commission in July 2007). In sum, a committee is charged with the same responsibility to "allay
5 concerns over the receipt of prohibited contributions" regarding its online contributions as its
6 contributions solicited and received through any other method. *Id.* (quoting Matching Credit
7 Card and Debit Card Contributions, 64 Fed. Reg. at 32395).

8 As a safeguard against receiving prohibited contributions, the Act's regulations hold the
9 committee's treasurer "responsible for examining all contributions received for evidence of
10 illegality." 11 C.F.R. § 103.3(b). While contributions that may "present genuine questions" as
11 to whether they were made by foreign nationals or other prohibited parties may initially be
12 deposited into a campaign's depository, the treasurer is charged with making his or her "best
13 efforts to determine the legality of the contributions." 11 C.F.R. § 103.3(b)(1). If the
14 contribution cannot be determined to be legal, or is discovered to be illegal even though it "did
15 not appear to be illegal" at the time it was received, the treasurer must refund the contribution
16 within thirty (30) days of the date of said discovery. 11 C.F.R. § 103.3(b)(2). By contrast, if the
17 committee determines that a contribution exceeds the contribution limitations enumerated in
18 2 U.S.C. § 441a(a)(1), the treasurer has sixty (60) days to refund the excessive contribution, or
19 obtain a written redesignation or reattribution of the excessive portion. 11 C.F.R.
20 § 110.1(b)(3)(i).

21 **A. Background**

22 The Obama Victory Fund is a joint fundraising committee established pursuant to
23 11 C.F.R. § 102.17, whose participants were Obama for America ("OFA"), the principal

13044323937

1 campaign committee for President Barack Obama during the 2008 election cycle, and the
2 Democratic National Committee ("DNC"). The Victory Fund filed its Statement of Organization
3 on June 10, 2008 and received over \$198 million in contributions during the 2007-2008 election
4 cycle. During the 2008 election cycle, as a joint fundraising committee established pursuant to
5 11 C.F.R. § 102.17, the Victory Fund was permitted to accept contributions up to the maximum
6 combined limits of the participating committees, which in this case would be \$33,100 per donor
7 (the OFA limit of \$2,300 each for the primary and general elections and the DNC limit of
8 \$28,500). 11 C.F.R. § 102.17(a).

9 **B. Excessive Contribution Allegation**

10 **1. Facts**

11 The complaints involve allegations based on Complainants' direct review of disclosure
12 reports filed by the Victory Fund as well as information gleaned from online media reports, and
13 claim that Respondents accepted excessive contributions in addition to knowingly receiving
14 contributions from prohibited sources. Daniels Complaint at 1; Moore Complaint at 1.
15 Complainants list hundreds of individuals whom they claim made contributions exceeding
16 \$4,600 (which would be the aggregate total of the permissible amounts of \$2,300 each for the
17 primary and general elections) and contend that this is evidence that the Victory Fund
18 contribution processes were utterly lacking in the appropriate internal controls to ensure
19 compliance with the FECA. Daniels Complaint at 1; Moore Complaint at 1.

20 The Victory Fund denies the allegations in the complaints and contends that it maintained
21 the appropriate procedures to ensure that contributions received by the Victory Fund were
22 properly allocated and did not exceed contribution limits. OVF Responses in MURs 6139 &
23 6142 at 2. Moreover, the Victory Fund asserts that to ensure that contributors did not exceed

1 applicable contribution limits, the Victory Fund verified all contributions it received with the
2 donor records for OFA and the DNC. *Id.* If any contribution aggregated to exceed applicable
3 limits to OFA, the excessive amount was first reallocated to the DNC; if after the DNC
4 reallocation the contributions still exceeded applicable limits, the excessive amount was refunded
5 to the contributor. *Id.* at 3.

6 2. Analysis

7
8 The FECA provides that no person shall make contributions to a candidate for federal
9 office or his authorized political committee, which in the aggregate exceed \$2,300 each for the
10 primary and general elections. 2 U.S.C. § 441a(a)(1)(A). For the 2008 election cycle, the Act
11 permits a national political party to receive from individuals or persons other than a
12 multicandidate committee up to \$28,500. 2 U.S.C. § 441a(a)(1)(B). Additionally, a joint
13 fundraising committee established pursuant to 11 C.F.R. § 102.17, may accept up to \$33,100 per
14 donor. 11 C.F.R. § 102.17(a). The Act prohibits a candidate or political committee from
15 knowingly accepting contributions in violation of the contribution limits set forth in the FECA,
16 *see* 2 U.S.C. § 441a(f), and where a committee has received an excessive contribution, it has
17 sixty (60) days to identify and redesignate, reattribute or refund the excessive amount. 11 C.F.R.
18 § 110.1(b); *see also* discussion, *supra*, pp. 5-6.

19 The Victory Fund denies allegations that any of its donors made excessive contributions.
20 OVF Responses in MURs 6139 & 6142 at 2. The Victory Fund accurately notes that it is not
21 subject to the \$2,300 per election contribution limit, as asserted in the complaint, rather it is
22 subject to the \$33,100 contribution limit reserved for joint fundraising committees. *Id.*
23 Moreover, the Victory Fund avers that it has procedures to ensure that its donors do not exceed
24 applicable contribution limits, which include matching all contributions it received to the donor

1 records of OFA and the DNC. *Id.* The response states that any contributions the Victory Fund
2 received that might have been excessive when aggregated with prior contributions to OFA were
3 either reallocated to the DNC or refunded to the contributor. *Id.*

4 The Commission reviewed the information submitted in the complaints and responses in
5 MURs 6139 and 6142 as well as the disclosure reports filed by the Victory Fund and determined
6 that Complainants' allegations appear to rely on the mistaken belief that the Victory Fund is
7 subject to the individual contribution limit of \$2,300 per election for candidates or candidate
8 committees, as set forth in Section 441a(a)(1)(A). In fact, as a joint fundraising committee, the
9 Victory Fund is subject to the \$33,100 per individual contribution limit set forth in 11 C.F.R.
10 § 102.17. None of the individuals cited in the complaints exceeded this limit. Thus, the
11 information Complainants submit as prima facie evidence that the Victory Fund violated Section
12 441a(f) is insufficient to support a reason to believe finding. Moreover, the Commission found
13 no additional facts to support the claim that the Victory Fund accepted excessive contributions.

14 Finally, there is no support for Complainants' allegations that the Victory Fund violated
15 the reporting requirements of 2 U.S.C. § 434(b) by misreporting disbursements to OFA, and
16 failing to provide identifying information for contributors who gave less than \$200. The Victory
17 Fund responses and disclosure reports indicate that the transfers from the Victory Fund to OFA
18 were made for ordinary disbursements of net proceeds pursuant to the joint fundraising
19 agreement between OFA and DNC, and were reported correctly. 11 C.F.R. § 102.17; see OVF
20 Responses in MURs 6139 and 6142 at 3. Further, the Act does not require committees to
21 disclose the identification information of donors who contribute less than \$200 in the aggregate
22 during the election cycle. See 11 C.F.R. § 102.9.

1 Accordingly, the Commission found no reason to believe that the Obama Victory Fund
2 and Andrew Tobias, in his official capacity as Treasurer, received excessive contributions in
3 violation of 2 U.S.C. §§ 441a(f) and 434(b).

4 **C. Possible Foreign National Contributions**

5 The FECA provides that it is unlawful for a foreign national, directly or indirectly, to
6 make a contribution or donation of money or other thing of value in connection with a Federal,
7 State, or local election, or to a committee of a political party and for a federal political committee
8 to receive or accept such a contribution. 2 U.S.C. § 441e(a)(1) and (a)(2); 11 C.F.R. § 110.20(b).

9 A "foreign national" is an individual, partnership, association, corporation or other entity
10 organized under the laws of or having its principal place of business in a foreign country.

11 2 U.S.C. § 441e(b). A "foreign national" does *not* include a person who is a citizen, national or
12 lawful permanent resident of the United States. *Id.*

13 Although the statute is silent as to any knowledge requirement, the Commission's
14 implementing regulations clarify that a committee can only violate Section 441e with the
15 *knowing* solicitation, acceptance, or receipt of a contribution from a foreign national. 11 C.F.R.
16 § 110.20(g). The regulation contains three standards that satisfy the "knowing" requirement:
17 (1) actual knowledge; (2) reason to know; and (3) willful blindness. 11 C.F.R. § 110.20(a)(4)(i)-
18 (iii). The reason-to-know standard is satisfied when a known fact establishes "[s]ubstantial
19 probability" or "considerable likelihood" that the donor is a foreign national. *See* Explanation
20 and Justification for Prohibition on Contributions, Donations, Expenditures, Independent
21 Expenditures and Disbursements by Foreign Nationals, 67 Fed. Reg. 69940, 69941 (quoting

1 BLACK'S LAW DICTIONARY, 5th Ed. (1979)). The willful blindness standard is satisfied when "a
2 known fact should have prompted a reasonable inquiry, but did not." *See id.* at 69940.²

3 Several of the complaints allege that the Victory Fund violated 2 U.S.C. § 441e by
4 accepting contributions from foreign nationals. As support for these allegations, different
5 Complainants focus on the fact that contributors with foreign addresses gave to the Victory
6 Fund, some contributions from individuals with foreign addresses were not made in whole dollar
7 amounts (which Complainants suggest means that the funds had been converted to U.S. dollars
8 from a foreign currency), and various media outlets reported anecdotes about a half dozen
9 foreign nationals may have contributed to OFA.

10 Complainants argue that there are widespread problems with the Victory Fund's
11 compliance system, which warrant investigation into all of the Victory Fund's contributions
12 received from individuals with foreign addresses. Daniels Complaint at 1; Moore Complaint at
13 1. The Victory Fund maintains that its vetting procedures required online contributors to
14 confirm citizenship or permanent resident status by checking a box. OVF Response in MURs
15 6139 & 6142 at 2. Further, contributors with foreign addresses had to enter a valid U.S. passport
16 number. *Id.* Finally, the Victory Fund asserts that it maintained a system that at regular intervals
17 surveyed all contributions received from foreign addresses, personally contacted contributors

² Before the regulation was revised in 2002, Commissioners expressed concerns about the level of scrutiny required under Section 441e. For example, a Statement of Reasons ("SOR") issued in a Section 441e case decided shortly before revision of the regulation examined the statutory language and legislative history to conclude that despite the absence of precise language of a "knowledge requirement" in the statute, "it would be fundamentally unjust to assess liability on the part of a fundraiser or recipient committee that solicits or receives a contribution if the contribution in fact appears to be from a legal source, especially if initial screening efforts resulted in specific assurances of the contribution's legality." MURs 4530, 4531, 4547, 4542, 4909 (Statement of Reasons by Commissioner Thomas *in re* Democratic National Committee, et al.) at 3. Thus, coupled with the Explanation and Justification issued in November 2002, a knowledge requirement may be inferred based on similar provisions in the Act that specifically included such language despite the absence of any knowledge requirement in the statute. *Id.* at 2 (citing 2 U.S.C. §§ 441f, 441b(a)). *See also* 11 C.F.R. § 105.3(b)(1), which provides that contributions which did not appear to be from a prohibited source must be returned within a specified period from the date on which the committee becomes aware of information indicating that the contribution is unlawful.

1 who were not known to be U.S. citizens or lawful permanent residents, and required the
2 submission of valid U.S. passport information. *Id.*

3 Based on the information in the complaints, as well as a review of publicly available
4 information, there is no indication that the Victory Fund received even a single contribution from
5 an individual who has been demonstrated to be a foreign national. There are no examples
6 provided in the complaints or in the publicly available media or disclosure reports. Thus, there
7 appears to be no support for the claim that there are systematic breakdowns in OVF's monitoring
8 for contributions from foreign nationals. Accordingly, the Commission found no reason to
9 believe that the Obama Victory Fund and Andrew Tobias, in his official capacity as Treasurer,
10 violated 2 U.S.C. § 441e by accepting contributions from foreign nationals.

11 **D. Possible Contributions from Unknown Individuals**

12 The Act provides that no person shall make a contribution in the name of another person,
13 and no person shall knowingly accept a contribution made by one person in the name of another.
14 See 2 U.S.C. § 441f. A committee has thirty days from the date that a prohibited contribution is
15 made or discovered to have been made to refund the impermissible contribution. 11 C.F.R.
16 § 103.3(b)(2).

17 The complaints allege that individuals made contributions to the Victory Fund using
18 fraudulent or fictitious names, and the Victory Fund's online fundraising mechanism provided no
19 internal controls to circumvent the receipt of such prohibited contributions. Daniels Complaint
20 at 1; Moore Complaint at 1. As discussed above, the Commission has provided guidance to
21 committees that they may use Internet fundraising so long as committees use reasonable
22 safeguards to enable them to verify the identity of contributors and screen for impermissible
23 contributions with the same level of confidence that applies to other methods of fundraising, and

1 act consistently with Commission regulations. *See* AO 1999-09 (Bill Bradley for President,
2 Inc.). Complainants contend that the Victory Fund had no control mechanisms in place to catch
3 third party fraud. Daniels Complaint at 1; Moore Complaint at 1. Consequently, the complaints
4 argue, an investigation of all contributions is warranted. *Id.*

5 Respondents assert that the complaints presented no credible information that the Victory
6 Fund had accepted contributions from unknown persons and was based wholly on speculation.
7 OVF Response in MURs 6139 & 6142 at 2. The Victory Fund asserts that its internal system
8 runs regular searches of its donor database in order to identify contributions that might violate
9 the Act. *Id.*

10 There are no indications that the Victory Fund received contributions from the
11 individuals specified in any of the complaints. The Commission's review determined that a
12 contribution was made by a person named "Anonymous, Anonymous" totaling \$2,228. The
13 Victory Fund's compliance system identified the suspect contribution and flagged it for
14 verification, but did not refund it within the 30 days permitted by the Act.

15 Despite this apparent violation of Section 441f, the Commission determined that
16 dismissal of these allegations is appropriate because (1) the prohibited contributions cited in the
17 complaint are minimal when compared to the total amount of contributions received by OVF
18 (\$2,228 accounts for .001% of \$93 million received), and (2) allegations of breakdowns in the
19 compliance system set forth in the complaints are not borne out by the Commission's review of
20 the contributions received by the Victory Fund. Thus, the Commission determined it would not
21 be an efficient use of the Commission's resources to open an investigation into this issue. *See*
22 *Heckler v. Chaney*, 470 U.S. 821 (1985); MUR 5950 (Hillary Clinton for President) (Factual and

MURs 6139 and 6142
Obama Victory Fund Factual & Legal Analysis

- 1 **Legal Analysis dismissing Section 441e violation to preserve resources where prohibited**
- 2 **contributions were refunded before the complaint was filed).**

- 3 **Accordingly, the Commission dismissed allegations that the Obama Victory Fund and**
- 4 **Andrew Tobias, in his official capacity as Treasurer, violated 2 U.S.C. § 441f by accepting**
- 5 **contributions from unknown persons in the name of another.**

13044323945